

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

_____)	
CONSERVATION LAW FOUNDATION, INC.)	
)	Civil Action No.
)	1:15 – CV – 13879 – LTS
Plaintiff,)	
)	Proposed Consent Decree
v.)	
)	
SHEA CONCRETE PRODUCTS, INC.)	
)	
Defendant.)	
_____)	

WHEREAS, Plaintiff Conservation Law Foundation, Inc. (“CLF”) filed the above-captioned action against Defendant Shea Concrete Products, Inc. (“Shea Concrete”), alleging violations of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (“Clean Water Act”), and seeking declaratory and injunctive relief, civil penalties, and attorneys’ fees and costs;

WHEREAS, CLF is a regional, nonprofit environmental organization;

WHEREAS, Shea Concrete owns and operates a concrete products manufacturing site located at 773 Salem Street, Wilmington, MA 01887 (the “Facility”);

WHEREAS, CLF alleged that the Facility discharged stormwater associated with its industrial activities without a Clean Water Act discharge permit to waters of the United States;

WHEREAS, CLF alleged that the Facility discharged process wastewater associated with its industrial activities without a Clean Water Act discharge permit to waters of the United States;

WHEREAS, CLF alleged in its complaint (the “Complaint”) and in a letter (the “Notice Letter”) dated September 18, 2015, sent to Shea Concrete, that Shea Concrete violated Sections 301(a) and 402(p)(2)(B) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B);

WHEREAS, Shea Concrete received coverage under a stormwater discharge permit for the Facility on December 17, 2015; and

WHEREAS, Shea Concrete denies the allegations set forth in the Complaint, but CLF and Shea Concrete (collectively, “the Parties”) agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of this Decree is the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, without the admission by Shea Concrete of any of the facts or violations alleged in the Complaint, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 33 U.S.C. § 1365(a).

2. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the events giving rise to this action occurred at the Shea Concrete Facility, located at 773 Salem Street, Wilmington, MA 01887, and in the Charles Watershed, which are located within this judicial district.

II. COMPLIANCE PROGRAM

3. Shea Concrete shall not cause or allow process wastewater to discharge from the Facility, unless consistent with state and federal statutory and regulatory requirements and discharge permits.

4. Defendant shall comply with the 2015 National Pollutant Discharge Elimination System (“NPDES”) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (“MSGP”) at the Facility. The MSGP, as it may be updated from time to time, is incorporated into this Consent Decree by reference.

5. Shea Concrete shall implement the provisions of its stormwater pollution prevention plan (“SWPPP”), developed in accordance with Parts 5 and 8.E of the MSGP, at the Facility, including, but not limited to:

- a. Implementation of practices at the Facility by a pollution prevention team of qualified personnel to ensure compliance with the MSGP;
- b. Installation and maintenance of appropriate control measures that minimize the discharge of pollutants during storm events from each potential stormwater pollution source at the Facility; and
- c. Performance of required inspection and monitoring activities, as well as regular maintenance of stormwater control measures, at the Facility.

6. Shea Concrete shall implement and maintain stormwater control measures, in accordance with Part 2.1 of the MSGP, to meet numeric and non-numeric effluent limits and benchmark levels.

7. Shea Concrete shall implement and maintain stormwater control measures that include the following categories of site-specific best management practices (“BMPs”) as described in the SWPPP, as may be amended from time to time:

- a. Good housekeeping practices;
- b. Minimizing exposure of potential pollutant sources to precipitation;
- c. Erosion and sediment control; and
- d. Management of runoff.

8. Shea Concrete shall implement and maintain stormwater control measures at the Facility as described in the SWPPP, as may be amended from time to time, which include, but are not limited to:

- a. The site-specific BMPs listed in Part 8.E of the 2015 MSGP (or the analogous section in later iterations of the MSGP); and
- b. The “BMPS for Potential Pollutant Sources at Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities,” listed in Table 2 of the United States Environmental Protection Agency’s (“EPA”) *Industrial Fact Sheet Series for Activities Covered by EPA’s MSGP (Sector E: Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities)*, available at: http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_e_glass.pdf.

9. Wherever feasible, Shea Concrete will design, install, and implement control measures that employ a low-impact development (“LID”) approach. LID is a natural-resource-based alternative approach to site design that incorporates a variety of structural and non-structural techniques, such as vegetated areas that collect, treat and infiltrate stormwater and shallow drainage channels that slow runoff and filter it.

III. MONITORING PROGRAM

10. Shea Concrete must comply with all inspection, monitoring, and reporting requirements of the MSGP.

11. Shea Concrete must perform inspections, pursuant to the requirements of Part 3 of the MSGP, and include, at a minimum, the stormwater collection (BMP) areas where runoff is generated, received, stored, treated, or disposed and that are exposed to either precipitation or stormwater runoff. Shea Concrete shall conduct benchmark monitoring and submit quarterly monitoring results to EPA, pursuant to the requirements of Parts 6 and 7 of the MSGP.

12. During the first year after this Consent Decree is entered by the Court (the “Effective Date”), Shea Concrete shall implement stormwater control measures as necessary to meet the benchmark levels for the monitoring parameters (Total Suspended Solids and Total Iron)

set forth in MSGP Part 8.E. If, after the end of twelve months from the Effective Date of this Decree, if the annual average of Shea Concrete's quarterly monitoring results for any parameter exceed MSGP Part 8.E benchmark levels, Shea Concrete agrees to pay stipulated additional Supplemental Environmental Project payments, as set forth in Paragraph 16 of this Decree.

13. During the life of the Decree, CLF, through representatives, may conduct four (4) site inspections at the Facility. The site inspections shall occur during normal business hours and upon twenty-four (24) hours prior notice to Shea Concrete. During the site inspection, CLF representatives may collect water and soil samples and take photos at the Facility. Any such samples shall be split samples with one of the split samples remaining in the possession of Shea Concrete.

14. During the life of the Decree, Shea Concrete shall copy CLF on all documents related to water quality or Clean Water Act compliance at the Facility submitted to the EPA, MA DEP, or any municipality. Such documents shall be provided to CLF concurrently as they are sent to the agencies and/or municipalities.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT

15. Within 60 days of the Effective Date, Shea Concrete shall make a payment to a Supplemental Environmental Project ("SEP"), in the amount of twenty thousand dollars (\$20,000), to the Ipswich River Watershed Association, located at P.O. Box 576, Ipswich, MA 01938, for work to benefit water quality in the Ipswich River Watershed. Shea Concrete shall notify CLF in writing when the payment is made and provide a copy of the check.

16. For each exceedance of an MSGP benchmark, as described in Paragraph 12 of the Decree, Shea Concrete will make an additional SEP payment to Ipswich River Watershed Association in the amount of four thousand dollars (\$4,000.00) for work to benefit water quality in the Ipswich River Watershed. Payment of each such additional amount shall be due fourteen (14) days following each exceedance.

17. For each missed deadline included in this Decree, including but not limited to failures to timely conduct inspections and quarterly benchmark monitoring, pursuant to Parts 3 and 6 of the MSGP, but not including missed payment deadlines (discussed in Paragraph 20 below), Shea Concrete will make an additional SEP payment to Ipswich River Watershed Association in the amount of one thousand dollars (\$1,000.00) for work to benefit water quality in the Ipswich River Watershed. Payment of each such additional amount shall be due fourteen (14) days following each missed deadline. Shea Concrete shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Pursuant to Paragraph 40, below, Shea Concrete shall not be required to make such additional SEP payment for missed deadlines arising from a Force Majeure event.

18. None of the SEP payments shall be disbursed to CLF.

V. LIQUIDATED ATTORNEY FEES AND COSTS

19. Within 30 days of the Effective Date, Shea Concrete shall pay to CLF a total sum

of thirty thousand dollars (\$30,000) as full and complete satisfaction of CLF's claim for attorneys' fees and costs incurred to date in this matter and to help defray CLF's reasonably anticipated fees and costs incurred in conducting compliance monitoring and case management during the term of this Decree.

20. In the event that any payment owed by Shea Concrete under the Decree is not made on or before the due date, Shea Concrete shall be deemed in default of its obligations under this Decree. In addition to a continued requirement to make said payment, Shea Concrete shall pay to CLF liquidated attorney fees of five-hundred dollars (\$500) for every day that a payment is late.

VI. EFFECT OF DECREE

21. CLF covenants not to sue and releases Shea Concrete (and its parent corporations/entities, subsidiaries, officers, directors, shareholders, employees, agents, attorneys, consultants, successors, and assigns) from any and all claims, causes of action, or liability under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for damages, penalties, fines, injunctive relief, or any other claim or relief (i) relating to or resulting from noncompliance with the Clean Water Act, including, without limitation, noncompliance with the MSGP at the Facility located at 773 Salem Street, Wilmington, MA 01887 occurring prior to the date the Court enters this Decree, or (ii) for any past violations either alleged or which could have been alleged in the Complaint, and (iii) for any violations either alleged or which could have been alleged or referenced in the Notice Letter.

22. Shea Concrete releases and discharges CLF (and its subsidiaries, officers, directors, trustees, representatives, assigns, agents, employees, officers, and attorneys, including those who have held positions in the past) from any and all claims, liability, demands, penalties, costs, and causes of action of every nature which concern or are connected with this action.

23. Neither this Decree, nor terms thereof, nor performance of the terms thereunder by Shea Concrete shall constitute or be construed as an admission or acknowledgment by Shea Concrete of the factual or legal assertions contained in CLF's Complaint, and Shea Concrete retains the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Decree, the validity of the facts or determinations contained in the Complaint. Neither this Decree, nor terms thereof, nor performance of the terms thereunder, shall constitute or be construed as an admission or acknowledgment by Shea Concrete of any liability, or an admission of violation of any law, by Shea Concrete or by its officers, directors, employees, agents, shareholder, attorneys, consultants, successors, or assigns.

24. CLF does not, by consent to the Decree, warrant or aver in any manner that Shea Concrete's compliance with this Decree will constitute or result in compliance with federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Shea Concrete to comply with all federal, state, and local laws and regulations.

VII. REVIEW AND TERM OF DECREE

25. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent

Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and the EPA. Therefore, upon signing of this decree by the Parties, the Parties shall jointly inform the Court of the Decree and request to stay all deadlines, and CLF shall serve copies of this Decree upon the EPA Administrator, the Regional EPA Administrator, and the U.S. Attorney General for review, as required by 40 C.F.R. § 135.5.

26. Upon the expiration of the forty-five-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will jointly move the Court for entry of this Decree. This Decree shall take effect on the date it is entered by this Court and shall terminate upon the following: (1) five (5) years have passed from the Effective Date; and (2) completion of all payment obligations set forth in this Decree. If for any reason the Court should decline to approve this Decree in the form presented, the Parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Decree.

VIII. MODIFICATION AND ENFORCEMENT OF DECREE

27. This Decree may be modified only upon written consent of the Parties and the approval of the Court.

28. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance, and/or resolve any dispute regarding the terms or conditions of this Decree. If the Court does not agree to retain jurisdiction over this matter, then this Consent Decree will remain in full force and effect between the Parties, and any Party may institute a new action in the United States District Court for the District of Massachusetts concerning their respective rights and obligations under this Decree.

IX. MISCELLANEOUS PROVISIONS

29. This Decree shall remain in effect if Shea Concrete relocates the Facility to a different location.

30. Sections I, IV, V, VI, VII, VIII and IX of this Decree shall remain in effect if Shea Concrete ceases to be the operator of the Facility, regardless of whether the Facility continues to operate or not.

31. All payments pursuant to this Decree shall be made in form of a certified bank check.

32. Each person signing this Decree represents and warrants that s/he has been duly authorized to enter into this Decree by the Party on whose behalf it is indicated that the person is signing.

33. Entire Agreement. This Decree constitutes the entire agreement among the Parties concerning the subject matter hereof and supersedes all previous correspondence, communications, agreements and understandings, whether oral or written, among the Parties.

34. Notices. Any notice, demand, copies of documents, and other communications required to be made under the provisions of this Decree (collectively, "Notices") by any Party hereto shall be effective only if in writing and (a) emailed, (b) personally served, (c) mailed by United States registered or certified mail, return receipt requested, postage prepaid, or (d) sent by a nationally recognized courier service (i.e., Federal Express) for next-day delivery, to be confirmed in writing by such courier. Notices shall be directed to the Parties at their respective addresses set forth below. Notices given in the foregoing manner shall be deemed given when (a) sent via email, (b) actually received or refused by the party to whom sent if delivered by courier, or (c) if mailed, on the day of actual delivery as shown by the addressee's registered or certified mail receipt or at the expiration of three (3) business days after the date of mailing, whichever first occurs.

Notices for Plaintiff shall be sent to:

Caitlin Peale Sloan, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
cpeale@clf.org

Notices for Shea Concrete shall be sent to:

Edward Shea, President and Director
Shea Concrete Products Inc.
3 Ward Street
N. Tewksbury, MA 01876

With a copy to:

Glenn A. Wood, Esq.
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
gwood@rubinrudman.com

Each Party shall promptly notify the other Party of any change in the above-listed contact information by using the procedures set forth in this paragraph.

35. Successors and Assigns. This Decree shall be binding upon and inure to the benefit of the Parties and their respective representatives, heirs, executors, administrators, successors, officers, directors, agents, employees and permitted assigns.

36. Interpretation. The provisions contained herein shall not be construed in favor of or against any Party because that party or its counsel drafted this Decree, but shall be construed as if all Parties prepared this Decree, and any rules of construction to the contrary are hereby specifically waived. The terms of this Decree were negotiated at arm's length by the Parties hereto.

37. Headings. The section and paragraph headings contained in this Decree are for reference purposes only and shall not affect in any way the meaning or interpretation of this Decree.

38. Counterparts. Facsimile, electronic, and scanned signatures shall be deemed to be originals for all purposes. Copies of the original Agreement, whether transmitted by facsimile or other means, shall be effective. This Agreement may be signed in counterparts.

39. Severability. In the event that any of the provisions of this Decree are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

40. Force Majeure. For purposes of this Decree, a "Force Majeure event" is defined as any event arising from causes beyond the control of Shea Concrete that delays or prevents the timely performance of any obligation under this Decree, except for obligations as provided in Paragraphs 14 and 18, notwithstanding Shea Concrete's best efforts to avoid the delay. The deadline for the responsibility to perform any action under this Decree may be extended for up to the number of days of nonperformance caused by the Force Majeure event, provided that Shea Concrete complies with the notice requirements of this paragraph. Examples of events which may constitute Force Majeure events include severe weather events, natural disasters, and national, state, or regional emergencies. Examples of events that are not Force Majeure events include, but are not limited to, normal inclement weather, unanticipated or increased costs or expenses of work, Shea Concrete's financial difficulty in performing such work, and acts or omissions attributable to Shea Concrete's contractors or representatives.

If any event occurs which may delay or prevent the performance of any obligation under this Decree, caused by a Force Majeure event, Shea Concrete shall notify CLF, at the address specified in Paragraph 32 above, within three (3) business days after Shea Concrete first knows, or should know, that the event might cause a delay. This written notice to CLF shall include, without limitation: (i) an explanation of the causes of any actual or expected delay or noncompliance; (ii) the anticipated duration of delay; (iii) the measures taken and to be taken by Shea Concrete to prevent or minimize the delay or nonperformance; (iv) a proposed schedule for the implementation of such measures; and (v) a statement as to whether in the opinion of Shea Concrete the Facility can continue to operate in a manner which will not violate this Decree.

If CLF agrees that a delay or anticipated delay in performance is attributable to Force Majeure, the time for performance of the obligations under this Decree that are affected by the Force Majeure event shall be extended for the period of time reasonably necessary to allow performance of the obligation to the extent the delay was caused by a Force Majeure event. CLF shall not unreasonably withhold its approval or agreement.

CONSERVATION LAW FOUNDATION



By: _____

Date: February 29, 2016

Christopher M. Kilian, Vice President and Director
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
ckilian@clf.org

SHEA CONCRETE PRODUCTS, INC.

By: /s/ Edward Shea, President and Director

Date: 2/29/16

Edward Shea, President and Director
Shea Concrete Products Inc.
3 Ward Street
N. Tewksbury, MA 01876

ENTERED and DATED this ____ day of _____, 2016

Honorable
United States District Judge